No. 3545

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CINCINNATI DISTRIBUTING COMPANY
(a corporation),
Plaintiff in Error,

vs.

SHERWOOD & SHERWOOD COMMERCIAL CO.
(a corporation),
Defendant in Error.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

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Pursuant to permission granted by the Court at the oral argument of this case, counsel for plaintiff in error file this reply brief.

It is unnecessary to further consider the first point urged for a reversal of the judgment in this case, namely, that the telegrams passing between Mr. Hellman and the Cincinnati Distributing Co., taken together and in connection with the coversation between Mr. Hellman and the managing director of defendant authorizing Mr. Hellman to send the concluding telegram (Plaintiff's Exhibit 3),

constitute a sufficient memorandum of the transaction to take this case out of the operation of the statute of frauds. The record is before the Court and the rule respecting the character of such memorandum is discussed in the case of *Brewer v. Horst,* 127 Cal. 643, cited in our opening brief.

The second ground urged by plaintiff for a reversal of the judgment in this case is that defendant by its conduct is estopped to raise the statute of frauds as a defense to this action. In support of our position in this respect, we have relied chiefly upon the case of *Seymour v. Oelrichs,* 156 Cal. 782, which is quoted from extensively in both briefs previously filed. It has been contended by defendant that the rule established in the above case, namely, that a defendant is estopped to urge the statute of frauds as a defense to an action where such a defense would constitute a fraud upon the plaintiff, is inapplicable in the case at bar. The distinctions suggested are as follows:

(1) That it does not appear that the witness Hellman was authorized to enter into any contract with defendant.

(2) That the evidence is insufficient to show that Harry Lieb had authority to bind defendant to the contract here sued upon.

(3) That there is no evidence of knowledge on the part of defendant that plaintiff intended to change its position by reselling the whiskey at the time that the conversation between Hellman and Lieb took place.

The first point may be eliminated without discussion, because it is not contended that Mr. Hellman acted as the agent of the defendant in the execution of the contract in controversy. It is only urged that Mr. Hellman was authorized by Mr. Lieb to send the telegram which we contend takes the contract out of the operation of the statute of frauds. The contract itself was entered into between Hellman, acting for plaintiff, and Lieb for the defendant at the time of the telephone conversation referred to in our opening brief.

It is next contended by defendant that there is no showing that Harry Lieb had any authority to bind the defendant. However, counsel concede that the record contains the statement that Mr. Lieb was representing Sherwood & Sherwood Commercial Company in this transaction and that he was the manager or managing head of that company (see defendant's brief, page 24). Counsel's contention that this evidence is insufficient is based upon the proposition that Section 2309 of the Civil Code of the State of California requires that where the contract is required by law to be in writing, the authority of the agent making the contract must similarly be in writing. It has been held in a very recent case that this section of the Code does not apply to the executive officers of a corporation.

Arnold v. La Belle Oil Company, 32 Cal. App. Dec. 100.

The managing director of a corporation is, of course, an executive head. It was also held in the

case of *Newhall v. Joseph Levy Bag Co.,* 19 Cal. App. 9, that parol evidence was admissible to prove the authority of the secretary of a corporation, to enter into a contract on behalf of the corporation, even though the contract sued upon was one for the purchase of merchandise over the value of $200, upon which no portion of the contract had been paid, nor any portion of the merchandise delivered, thus coming within the statute of frauds.

We beg further to direct the Court's attention to the fact that a contract of the character here sued upon is not required by law to be in writing in every instance. It is only where no portion of the merchandise has been delivered nor any portion of the contract price paid, that such contract is required to be in writing. The contract in question is one which arose in the ordinary course of business of the defendant corporation and under such circumstances, the following language of the District Court of Appeal of this State in the case of *Newhall v. Levy Bag Company,* supra, is particularly applicable:

> "It is a matter of common knowledge that a very large part of the mercantile business of the country is, as a matter of convenience, if not, indeed, as a matter of necessity, carried on by corporate organizations. It would greatly hamper their usefulness if all the daily current purchases and sales of merchandise could be made only by resolution of directors or that the public dealing with their officers would do so at the peril of having their con-

> tracts repudiated when they might happen to be unfavorable to the corporation or less profitable than anticipated when made."

The present case illustrates the application of this rule. It is an attempt on the part of the defendant to repudiate the authority of its general manager when a contract made by him, apparently profitable at the time it was executed, proved less profitable by reason of the sudden and rapid advance of the merchandise sold. The record discloses that, though at the price at which Mr. Lieb offered this whiskey to plaintiff, his firm would have made a profit of about $6,000 (Trans. page 9), the price of whiskey advanced from $1.35 per gallon (the contract price with plaintiff) to $1.85, within a period of two weeks (Trans. page 20). These figures indicate conclusively the reason why defendant now contends that its general manager was not authorized to make this contract on its behalf.

The final ground of distinction urged by defendant between this case and that of *Seymour v. Oelrichs,* is that in the latter case, defendant's agent knew that plaintiff as a result of his promise to reduce the contract to writing, resigned a position as captain of detectives in the City of San Francisco, which position he held for life at a salary of $250 per month. In the instant case, there was no evidence that defendant knew that plaintiff intended to alter its position as a result of the oral

contract made by its general manager by reselling the whiskey.

There is only one conclusion which can be reached from the testimony in this case as to the purpose for which plaintiff purchased this whiskey, and that is that is purchased it for resale.

Hellman stated that the only business in which plaintiff was engaged was that of whiskey broker (Trans. page 12). A broker is one who is engaged in the purchase and sale of merchandise on a commission basis, and it is a matter of common knowledge, which must be imputed to defendant, that when a broker purchases merchandise outright in his own name, it is for the purpose of immediate resale, if indeed a contract for its resale has not been entered into prior to its purchase.

If plaintiff was not buying this whiskey for the purpose of resale, we might aptly ask counsel, for what purpose their clients believed that plaintiff was purchasing 198 barrels of whiskey. As further evidence of the fact that Mr. Lieb knew that plaintiff was purchasing this whiskey for resale, we beg to direct attention to a letter written by him to Mr. Hellman (Plaintiff's Exhibit 6), in which he states:

> "The motto of this communication is do not *sell* what you have not purchased or what has not been sold to you."

This contract was written shortly after the conversation between Mr. Hellman and Mr. Lieb,

which we claim furnishes the basis of this transaction, and was the letter in which Mr. Lieb denied the execution of the contract which he entered into. In this same communication, Lieb very frankly expresses the reason why his company refused to deliver the whiskey to plaintiff. To quote his own language

> "To be candid and truthful, we have sold the whiskey at a much higher price than that which you offered."

It is respectfully submitted that this case contains every element of an estoppel to deny the statute of frauds suggested in the case of *Seymour v. Oelrichs:* First, we have an oral promise on the part of defendant to deliver merchandise to plaintiff at an agreed price; we have the statement of defendant's managing director that an invoice for the merchandise, together with warehouse receipt for the same, would be forwarded at once to plaintiff; we have the testimony of the president of the plaintiff corporation that immediately upon receiving information of the purchase of this merchandise and acting and relying upon defendant's promise to deliver the same, he contracted to sell the same amount of merchandise to another company. Then follows the repudiation of the contract by defendant after the goods had advanced in price. We next find that plaintiff, by reason of said repudiation, was compelled to and did purchase sufficient whiskey to comply with its contract of resale, at an advanced price, to its damage in a sum in excess of $5,000.

By reason of the foregoing facts, all of which appear undisputed upon the record, we respectfully submit that the trial Court erred in granting defendant's motion for a non-suit and that the writ of error herein should be granted.

Dated, San Francisco,
November 6, 1920.

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